IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

No. 83-6260

MICHAEL JAY TRAVAGLIA, Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA and
LeROY S. ZIMMERMAN, ATTORNEY GENERAL
OF PENNSYLVANIA, Respondents

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

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I. JURY SELECTION WAS PROPER AND VENIREMAN EXCLUDED FOR OPPOSITION TO THE DEATH PENALTY WERE PROPERLY EXCISED PURSUANT TO THE TEST IN WITHERSPOON V. ILLINOIS, 391 U.S. 510 (1968), AND ITS PROGENY.

It would be impossible, without a lengthy review of the entire voir dire transcript to understand the great lengths to which the trial judge went in assuring that the prospective jurors understood the questions that were asked, especially those questions relating to the death penalty. In fact, the trial judge made three separate efforts to select a fair and impartial jury. Initially, the trial judge attempted on June 2, 1980 to select a jury in Westmoreland County. This effort ended in a mistrial at the request of the defendant because of the extensive pre-trial publicity.

The trial judge attempted again, between September 3 and September 12, 1980 in Dauphin County to select a jury pursuant to Act 25 of 1980. Over 100 jurors were examined during seven court days. This attempt also was terminated by a mistrial at the defendant's request because a newspaper article, which alluded to the fact that the defendant had been charged in four murders was circulated in the jury assembly room.

The third effort to attempt a jury in this case was successful. The jury selection process took place in Reading, Pennsylvania, which is the County Seat of Berks County. It took twelve days beginning on January 5, 1981 and ending on January 19, 1981. 187 jurors were examined in order to select twelve jurors and four alternates.

At the time of the trial, the law in this Commonwealth in trials involving joint defendants provided that the defendants were entitled to a total of 20 peremptory challenges between them, and the Commonwealth was entitled to the total possessed by both defendant, viz: twenty. See Pennsylvania Rule of Criminal Procedure 1126(b) as the rule was in effect on January 5, 1981.

Irrespective of the law relative to peremptory challenges applicable at that time, the trial judge announced at the beginning of jury selection, that the Commonwealth would have a total of 20 peremptory challenges and each defendant would have twenty peremptory challenges. The bottom line to this ruling was that the Commonwealth would only have twenty peremptory challenges and the defendants would have a total of forty.

At the conclusion of the selection of the first twelve jurors (these were in fact the jurors that rendered the decision in this case, as there was no need to use any of the alternate jurors although four were selected and listened to testimony) the Commonwealth had exercised only nineteen peremptory challenges. Each of the defendants had utilized all twenty of their peremptory challenges. The fact that the Commonwealth did not use all of its peremptory challenges in selecting the first twelve jurors is relevant because if the trial judge had not granted the challenge for cause relative to Esther Kroh, the Commonwealth had an unused peremptory challenge available. The net effect would have been that the same jury would have been seated irrespective of the trial judge's ruling.

In order to ensure that the questioning of all the prospective jurors was conducted within constitutional limitation, the trial judge submitted a list of approved questions. These approved questions were reviewed by the Commonwealth's attorney and the defendant's attorney as well at the initial pre-trial conference conducted in May of 1980 before the first attempt to select a jury. It was agreed by all parties that the approved questions would set general parameters of the scope of each prospective juror and that any additional questions would have to be approved first by the Judge before they would be permitted to be asked on the record. The list of approved questions was admitted into

the record as Court Exhibt #1. Those approved questions which relate to capital punishment are as follows:

"16. Do you have any conscientious scruples against imposing the death penalty?

a. (An affirmative answer will not be sufficient to sustain a challenge for cause. If the juror answers in the affirmative, the juror should be asked the following question:

i. Are your feelings against the death penalty such that you would automatically vote against the imposition of such punishment irrespective of what evidence is presented and what law is given to you by the trial judge?

-or-

ii. ALTERNATIVE QUESTION: If in the trial of this case the evidence and the law establish that the death penalty should be imposed, could you participate in the imposition of the death penalty even though you have certain reserved feelings about the propriety of the death penalty?

ALTERNATE CAPITAL PUNISHMENT QUESTION:

16. Do you have any personal, moral or religious beliefs or convictions against capital punishment?

a. (If prospective juror answers yes:)

Are these beliefs or convictions so firm that you would automatically vote against the imposition of the death penalty irrespective of any evidence or law presented to you in this trial?"

A review of the above-cited questions will show that they incorporate the mandates and guidelines expressed by the United States Supreme Court in Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776, 88 S.Ct. 1770 (1968). A review of the three-volume jury selection transcript which covered 2247 pages will establish that in each and every instance, the trial judge scrupulously followed these guidelines; therefore, the defendant's general allegation that veniremen were excluded in violation of Witherspoon v. Illinois, supra. is without merit. The defendant further points specifically to Esther Kroh (the nineteenth prospective juror called)

and argues that her challenge for cause by the Commonwealth was granted by the Court in violation of the rule of Witherspoon v. Illinois, supra. The defendant's argument concerning the challenge of Esther Kroh is simply myopic. In order to determine whether or not Kroh was qualified to serve, it is necessary to consider her entire testimony (voir dire transcript at 253-264). The Court granted the challenge for cause based on Mrs. Kroh's entire testimony and her demeanor while testifying.

> "Q. THE COURT: Motion for challenge for cause is granted. Under the situation as observed and determined by the Court, this juror is not qualified to serve."
>
> (Voir Dire Transcript p. 262).

The challenge for cause which was granted by the Court was proper for two reasons. First, Mrs. Kroh's inconsistent answers indicate that she either violated her oath as a juror or was unable to understand the questions that were asked. In either case, she was not qualified to serve as a juror because all jurors must abide by their oaths; each juror must be willing to follow the law presented by the trial judge, and each juror must be able to follow the law presented by the trial judge. A juror must assume her duty with such impartiality and comprehension that she will be able to understand all the testimony and instructions so that she could intelligently decide not only why and when a death sentence should not be imposed, but also why and when it should be imposed.

Mr. Kroh indicated initially that she had no conscientious scruples against the death penalty and could vote either way on the quesion of sentencing depending on the evidence.

> "Q. Do you have any conscientious scruples against imposing the death penalty?

A. No sir.

(Voir Dire Transcript p. 255).

. . .

A. Well, I think I would vote either way.

Q. THE COURT: You're saying you could vote either way depending on the evidence?

A. Yes."

(Voir Dire Transcript p. 256).

On examination by defense counsel, however, Mrs. Kroh's answer changed markedly when she answered a question about the death penalty as follows:

"A. No sir, I'm opposed to the death penalty."

(Voir Dire Transcirpt p. 260).

Kroh was then accepted by counsel for the co-defendant Travaglia after which the following colloquy occurred between Kroh and the Court:

"Q. THE COURT: Are you saying under all circumstances, that irrespective of what evidence was given to you, because you are opposed to the death penalty, you could not participate in imposing the death penalty upon somebody, irrespective of what evidence was given to you?

A. Well, I am opposed, yes."

(Voir Dire Transcript p. 261).

This declaration by Mrs. Kroh disqualifies her as a juror in this case. The law of the Commonwealth of Pennsylvania provides for the imposition of the death penalty under certain circumstances. Consequently, her declaration indicates she would violate the law of the Commonwealth and the oath of a juror to base her determination on the eivdence and the law. The attorney for the defendant contends that Mrs. Kroh's answer was ambiguous. The trial court had the opportunity to hear the emphasis placed on the words; he had the opportunity to consider pauses between the words, and he had the

opportunity to observe Mrs. Kroh when she testified. These of course, are not discernible from the cold record. In fact, the trial judge indicated this on page 15 of his opinion in response to the defendant's post-trial motions.

The exclusion of Mrs. Kroh does not violate the mandates established by Witherspoon v. Illinois, supra. Witherspoon does not prevent the exclusion of veniremen who would automatically vote against the imposition of capital punishment without regard to any evidence that might be developed at the trial or those whose attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt. In order to properly evaluate the trial court's decision, of course, it is necessary to review Mrs. Kroh's testimony.

In order to juxtapose the testimony with testimony of other witnesses to determine whether or not the trial court was correct, the Commonwealth points to the testimony of prospective juror #121, Chester Spayd, Sr. (Voir Dire Transcript pp. 1480-1486). There, the cold record appears to demonstrate without question that Mr. Spayd was unqualified under the test in Witherspoon v. Illinois, supra. (See Voir Dire Transcript p. 1485). However, a colloquy between the trial court and Mr. Spayd revealed that in certain situations, he might vote for the death penalty. The trial court then denied the Commonwealth's challenge for cause.

The defendant cites no other specific juror nor will a review of the entire voir dire transcript reveal a single instance where any of the other jurors challenged for cause by the Commonwealth on the death penalty issue were not clear and unequivocal in their responses as is required in Witherspoon and its progeny.

II. THE INTRODUCTION OF EVIDENCE OF OTHER CRIMES OF THE DEFENDANT WAS RELEVANT AND WAS NOT VIOLATIVE OF DEFENDANT'S RIGHT TO DUE PROCESS.

Defendant complains that his right to due process has been violated by virtue f the application of a rule of evidence under state law specifically relevance.

A.) Waiver

The defendant's objection at trial and before the Supreme Court of Pennsylvania was in the form of an evidentiary objection only and it was addressed in that fashion by both courts below. Therefore the constitutional argument presented here has been waived.

B.) The objection raised by the defendant is not of constitutional dimensions in that it is merely the application of a long-standing state law of evidence to wit relevance in which evidence of other criminal activity or conduct of the defendant, while generally inadmissible to prove his commission of the crime for which he is being charged is nevertheless admissible, where it is relevant to prove (1) motive, (2) intent, (3) common scheme or plan, (4) the identity of the accused as the perpetrator or the absence of mistake or accident Commonwealth v. Styles, 494 Pa. 524, 431 A.2d 978 (1981). So long as the probative value of the testimony outweighs its prejudicial effect upon the jury, it is admissible.

There is no argument that in the defendant's case he was treated differently than others similarly situated nor does he argue that his was a change from prior law. The argument is simply that the court erred in applying its own rule of evidence which it did not. See EG Fed.R.Evid. 403 and 404(b) which are nearly identical to the Pennsylvania rule.

III. THE DEFENDANT'S PLEA OF GUILTY TO MURDER IN THE SECOND DEGREE IN INDIANA COUNTY, PENNSYLVANIA CONSTITUTED A CONVICTION AND WAS PROPERLY INTRODUCED IN EVIDENCE AS AN AGGRAVATING CIRCUMSTANCE.

Defendant complains that his right to due process has been violated by virtue of a change in Pennsylvania law which only applies to defendants charged with a capital crime.

A.) Waiver

The defendant's objection at trial and before the Supreme Court of Pennsylvania was to the introduction of certain evidence, but the objection was never couched in constitutional terms. It is being offered here in this light for the first time and therefore the constitutional argument has been waived.

B.) Even if there has been no waiver of the issue raised by the defendant there has been no attempt to change existing law as the defendant contends. It has long been the law in this Commonwealth that a plea of guilty when accepted and entered by the Court is equivalent to a conviction and a verdict of guilty by jury. Commonwealth ex rel. Hough v. Maroney, 425 Pa. 411, 229 A.2d 913 (1967); Commonwealth ex rel. Saddler v. Maroney, 422 Pa. 13, 220 A.2d 846 (1966); Commonwealth ex rel. Dandy v. Banmiller, 397 Pa. 312, 155 A.2d 97 (1959). See also, United States ex rel. Crosby v. Brierly, 404 F.2d 790 (1968) where the Court in citing Kercheval v. United States, 274 U.S. at 223, 47 S.Ct. at 583 held that:

> "A guilty plea . . . is itself a conviction, it is conclusive as a verdict . . . "; Commonwealth ex rel. Crosby v. Rundle, 415 Pa. 81, 202 A.2d 299, cert. den. 379 U.S.976, 13 L.Ed.2d 567 (1964).

The statute in question reads as follows:

> ". . . The defendant has been convicted of another Federal or

> state offense, committed either before or at the time of the offense at issue, for which a sentence of life imprisonment was imposable or the defendant was undergoing a sentence of life imprisonment for any reason at the time of the offense. . ." 42 Pa. C.S.A. §9711(d)(10).

The clear import of this aggravating circumstance is to make the commission of multiple serious crimes an aggravating circumstance. Since under Pennsylvania law a criminal defendant has a right to be tried within 180 days of the filing of a criminal complaint against him (see Pa.R.Crim.P. 1100), a holding that "convicted" means a final judgment of sentence removes the threat of the most serious aggravating circumstance in a situation involving, for example, multiple homicides, such as was the case here. Clearly, because of the time from the end of trial until a final judgment of sentence, there is no other way that an offense "committed either before or at the time of the offense at issue . . ." could be utilized as an aggravating circumstance if any other interpretation is given to the word "convicted" as it appears in aggravating circumstance number 10. (42 Pa. C.S.A. 9711(d)(10)).

The plea of guilty to the Nichols murder in Indiana County meets the criteria and requirements as specified in aggravating circumstance number 10 quoted above. (42 Pa. C.S.A. §9711(d)(10))

1. The Nichols murder was committed by the defendant before the Miller murder;
2. At the time of the Miller trial, the defendant had plead guilty to second degree murder for the killing of Nichols;
3. A sentence of life imprisonment was impossible at the time of defendant's plea to second degree murder for killing Nichols. In fact, life imprisonment is the only sentence that could have been imposed in the second degree murder plea of guilty.

IV. NEITHER THE REQUIREMENT THAT THE DEFENDANT PROVE MITIGATING CIRCUMSTANCES BY A PREPONDERANCE OF THE EVIDENCE NOR THE REQUIREMENT THAT THE JURY MUST SENTENCE THE DEFENDANT TO DEATH UPON A FINDING OF ONE AGGRAVATING CIRCUMSTANCE AND NO MITIGATING CIRCUMSTANCES IS IN VIOLATION OF LOCKETT V. OHIO, 438 U.S. 586 (1977).

A.) The specific issue raised by the defendant was addressed by the Supreme Court of the United States in the case of Keith Zettlemoyer v. The Commonwealth of Pennsylvania, 82-6514 and on May 31, 1983 the Court denied Certiorari.

B.) The Pennsylvania Death Penalty Statute 42 Pa. C.S.A. §9711 does require that the jury's "verdict must be a sentence of death if the jury unanimously finds at least one aggravating circumstance . . . and no mitigating circumstances, or one or more aggravating circumstances which outweigh any mitigating circumstances". This is clearly a mandatory rule, but it in no way prevents the jury from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense offered in mitigation. Lockett v. Ohio, 438 U.S. 586, 57 L.Ed.2d 973 98 S.Ct. 2954 (1978). The Court in Lockett v. Ohio, supra. found the Ohio Death Penalty Statute infirm under the Eighth and Fourteenth Amendments of the Federal Constitution because the Ohio Statute did not permit evidence relative to the defendant's character and record, and to circumstances of the offense (e.g. the fact that the defendant's participation in the homicidal act was relatively minor) unless they were in some way directly related to one of three enumerated mitigating circumstances. Lockett v. Ohio, at 438 U.S. 608. All of the cases cited by the defendant involved situations where mandatory death penalty statutes have been stricken down by the Supreme Court. Woodson v. North Carolina, 428 U.S. 280, 49 L.Ed.2d 944, 96 S.Ct. 2978 (1976); Roberts v. Lousiana, 428 U.S. 906, 49 L.Ed.2d 1213, 96 S.Ct. 3214 reh. den. 429 U.S. 890,

50 L.Ed.2d 174, 97 S.Ct. 248 (1976); Roberts v. Louisiana, 431 U.S. 633, 52 L.Ed.2d 637, 97 S.Ct. 1993 (1977). Each of the Statutes set forth in the cases cited above merely define a specific crime or crimes and then made the death sentence mandatory. These statutes did not provide any standards or guidelines for the jury to follow in arriving at a proper sentence. There is no case which says any mandatory death sentence is unconstitutional, certainly Lockett v. Ohio, supra., does not so hold.

It is the province of the Legislature to determine what circumstances may be considered in mitigation during a sentencing hearing. Patterson v. New York, 423 U.S. 198, 53 L.Ed.2d 284 (1977); Lockett v. Ohio, supra. In Pennsylvania, the Legislature has set forth in detail various mitigating factors and it has these factors which make the Pennsylvania death penalty statute entirely different from those statutes which has been declared unconstitutional. The challenged Pennsylvania statute lists the following mitigating circumstances:

1. The defendant has no significant history of prior criminal convictions.

2. The defendant was under the influence of extreme mental or emotional disturbance.

3. The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.

4. The age of the defendant at the time of the crime.

5. The defendant acted under extreme duress, although not such duress as to constitute a defense to prosecution under §309 (relating to duress), or acted under the substantial domination of another person.

6. The victim was a participant in the defendant's homicidal conduct or consented to the homicial acts.

7. The defendant's participation in the homicidal acts was relatively minor.

8. Any other evidence of mitigation concerning the character and record of the defendant in circumstances of his offense. See 42 Pa. C.S.A. §9711.

Not only does the Pennsylvania statute permit the jury to consider circumstances of the type which the Ohio statute made no provision for, (see Lockett, supra.) the Pennsylvania statute leaves within the sole province of the jury the weight to be given the mitigating circumstances, once they have been offered by the defendant. A Pennsylvania jury cannot impose the death sentence without first considering the aggravating and mitigating circumstances, including those which relate to the character and record of the defendant and the circumstances of the offense in question. Even more important, a Pennsylvania jury cannot impose a death sentence even under the mandatory aspects of the Pennsylvania statute without first finding that there were no mitigating circumstances. No death penalty statute similar to the current Pennsylvania statute has ever been determined to be violative of either the Eighth or Fourteenth Amendments of the Federal Constitution or the Pennsylvania Constitution, nor does the defendant cite any case so holding.

Finally, the defendant's argument concerning aggravating circumstance No. 6 " That the defendant committed a killing while in the perpetration of a felony" 42 Pa. C.P.A. §9711(a)(6) is irrelevant in light of this court's holding in Zant v. Stephens, ___U.S.___, 77 L.Ed.2d 235, 103 S.Ct.___ (1983) because no testimony was ever offered about this aggravating circumstance.

V. SYMPATHY IS NOT A MITIGATING FACTOR UNDER THE PENNSYLVANIA DEATH PENALTY STATUTE NOR DOES LOCKETT V. OHIO, 438 U.S. 586 REQUIRE OR EVEN SUGGEST SUCH A RESULT.

The defendant has redefined sympathy to be a mitigating factor which it is not. (See 42 Pa. C.A.A. §9711). At no time did the prosecutor or the trial court allude to the character witnesses offered by the defendant when discussing sympathy. Clearly the evidence offered by Michael Jay Travaglia from character witnesses was an attempt to establish the existence of mitigating factor No. 8 under the Pennsylvania Death Penalty Statute viz. any other evidence of mitigation concerning the character and record of the defendant and the circumstances of his offense. See Pa. C.S.A. §9711(e)(8). This is required by Lockett v. Ohio, 438 U.S. 586 (1977).

The trial court's charge about sympathy

> Your decision should not be based on sympathy, because sympathy could improperly sway you into one decision -- into a decision imposing the death sentence, or could improperly sway you against the decision imposing the death sentence. . . . Sympathy is not an aggravating circumstance; it is not a mitigating circumstance. [N.T. 1706].

and the reference in prosecutor's closing argument about sympathy

> "But I have a problem. Each one of you promised me, promised the judge, Mrs. Ambrose, Mr. Bertani, Mr. McCormick, Mr. Marsh and the defendants, when we started, that you would follow the law. You all promised that you wouldn't become a social activist. But I can't stop that. I can't stop you from walking out into that deliberation room after the judge charges you and saying to yourself, The Commonwealth has proved one or more aggravating circumstances, and there's no mitigating circumstances here at all, and the law says I must find these defendants and sentence them to death, but I won't do that, because I feel sympathy. And I also can't stop you from saying, well, I found one or more aggravating circumstances that have been proven beyond a reasonable doubt, and although I found mitigating circumstances, the

> aggravating circumstances outweigh them, and the law says that I must return a death penalty, but I won't, I'm going to show sympathy. I just can't stop you from doing that." [N.T. 1701].

were designed to take out of the case what the defendants had improperly put into it. This was a joint trial and both the defendant (Michael Jay Travaglia) and his co-defendant (John Charles Lesko) had been found guilty of murder in the first degree and the jury was hearing evidence in both cases.

Specifically the defendants themselves had attempted to cloud the issues by the following: Bernard Travaglia and Judith Travaglia, the parents of the defendant Michael Jay Travaglia both testified [N.T. 1594-1597] and both cried and sobbed in front of the jury; the final statement from Mrs. Travaglia being "... He's my son. I don't want him to die." [N.T. 1597] Mrs. Travaglia was extremely emotional, almost hysterical, at this point and that fact is reflected in the prosecutors closing argument:

> "You saw something yesterday afternoon which visibly shook every one of you. And if it hadn't, would have surprised me. And I feel that every one of you were filled with compassion. I was. But you're not here to decide this issue on sympathy. Sympathy is not a mitigating circumstance. When you think about sympathy, you have to feel and know that there are other people whose hearts have been heavy for a long time, since January 3, 1980. Consider the law, consider the evidence, and make a decision. [N.T. 1690].

Also the defendant's closing argument made reference to subjects that were not part of the jury's function as did the closing argument of his co-defendant. Both of these closing arguments relied on two basic premises: (1) the death penalty is inherently wrong and (2) the arousal of the jury's sympathy by inflamming them as to the nature of the death penalty as it is carried out:

Defendant Travaglia's Closing:

". . . If the killing of Michael Travaglia can bring back those people, then there would be a legitimate reason for killing Michael Travaglia. . . " [N.T. at 1677]

". . . two wrongs don't make a right. . . "[N.T. at 1697]

". . . other states don't have a death penalty - have they found out something more than we know . . . " [N.T. at 1680]

". . . thou shalt not kill. . . " [N.T. at 1683]

". . . some glorious day we're going to take Michael Travaglia out, and we're going to shave his head, we're going to put grease on his arms, we're going to strap him into an electric chair, and we're going to send all those volts through his body until his feet split open and his fingers split open, and he dies, and he's electrocuted. . . " [N.T. at 1678]

Defendant Lesko's Closing:

" . . . It's a death that is planned by the state for months, and its the kind of death that the condemned man waits for months to endure. Usually in terror. . . " [N.T. at 1665]

". . . And consider, with your knowledge of history, whether or not the death penalty was an instrument for the cure, the alleged cure of the social ills of the time which were many. That is expediency, not the law. . . " (emphasis added) [N.T. at 1666]

". . . Now, something else cured those social ills of the seventeenth and eighteenth centuries; it was not the death sentence. . . " [N.T. at 1667]

". . . if you return a verdict of death against John, you'll be saying the equivalent that we don't buy the doctrine that there is some good in every one of us that should be preserved, and if there is some good in someone it shouldn't make any difference. . . " [N.T. at 1672]

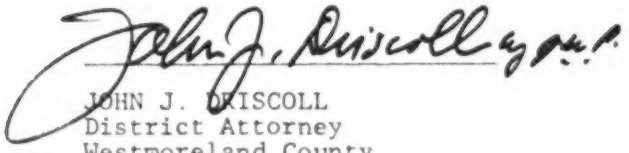
The testimony set forth above and the defendant's closing arguments were designed to arouse sympathy not to prove a mitigating circumstance. They have nothing whatsoever

to do with the character and record of the defendant nor the circumstances of his offense. 42 Pa. C.S.A. §9711(e)(8).

CONCLUSION

The Petition for Writ of Certiorari should be dismissed.

Respectfully submitted,



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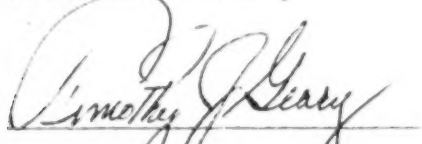

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